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COPY

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IN THE SUPREME COURT
OF THE STATE OF IDAHO

Frank L. Nicolai,
Appellant

VS:

State of Idaho,
Respondent

CASE NUMBER 41566-2013

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
ADA COUNTY IDAHO CASE NUMBER 2004-1698

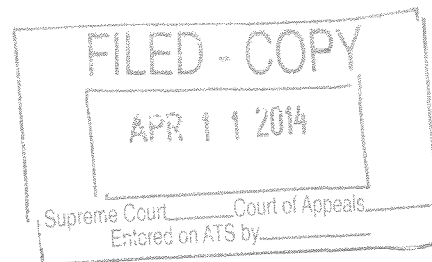
REPLY BRIEF OF APPELLANT

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PROCEDURAL STATEMENT

This is an appeal from the denial of a Motion to Correct an illegal sentence, which was filed under Idaho Criminal Court Rule 35.

The Appellant has alleged that the sentence as imposed upon him is not provided for in the laws of the State of Idaho, and therefore the Court lacked Subject Matter Jurisdiction to impose that sentence upon him. (The sentence of "Fixed Life" for a non-capital crime).

The State has responded and seems to suggest that there is no difference between a sentence of "Fixed Life, and a sentence of "life", and states that the Appellant has shown no proof that he would be eligible for parole after a set amount of years if his sentence would have been "life".

The Appellant now provides to this Court Exhibit A, which does in fact show that if sentenced to a term of "life", that he would be eligible for release upon parole after serving a term of 60 Months.

The Appellant has also shown that because he was sentenced after the effective date of the Unified Sentencing Act, that the provisions of that act apply to him.

The Unified sentencing act, codified as §19-2513, makes very specific findings and holdings. Most importantly, it provides for "Fixed terms". These are also known as mandatory minimums for which an inmate cannot be released during that time.

The State of Idaho has responded and seems to think that the term, "Consistent" as used in the second paragraph of §19-2513 gives the sentencing Court the authority to impose a "Fixed term" that is equal to or greater than the Minimum term as depicted for in the Statute.

This interpretation does not give meaning and effect to all the provisions of the Unified sentencing act. It would make the entire second paragraph totally useless.

The second paragraph of the Unified sentencing Act is very clear as to when it shall be used. It shall be used in those cases whereas there is a mandatory minimum term contained within the Statute for which a defendant is being sentenced. And, it also goes forward to hold that the "Fixed term" shall be consistent to the minimum term as depicted for in the statute.

To be consistent, a term can not be doubled. That would be twice as much as otherwise provided for; clearly not consistent.

To be consistent a term would have to be equal to; not greater than another. To be consistent, a term would need to be the same as another.

Finally, the Appellant has shown that he is being punished more severely than a person who is convicted of a Capital crime. A person who is convicted of a capital crime is granted certain Due Process protections prior to the imposition of a "Fixed Life" term, while a non-capital defendant is not.

At the time the sentence was pronounced upon the Petitioner he was given a term of "FIXED LIFE", which means that he will never be released from prison.

It is based upon the fact that the sentence of "FIXED LIFE" is more than what is prescribed by statute for the offense as charged; and more than the maximum possible punishment as told to the Petitioner at his arraignment that he is alleging that his sentence is illegal.

In the case of Apprendi V. New Jersey, 120 S.Ct. 2348, 147 L.Ed.2d 435, (2000), the United States Supreme Court held,

"...any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be proven beyond a reasonable doubt by being submitted to a jury".

There is no doubt that the punishment for the crime of Rape can be a sentence of "LIFE".

There is also no doubt that the sentence of "FIXED LIFE" is a more severe punishment than the sentence of "LIFE".

Because the sentence of the Petitioner is a sentence of "FIXED LIFE", and because this sentence is more than what is provided for by statute, (The statute naming that the sentence may be a term of "LIFE"), it is submitted that because the sentence of "FIXED LIFE" was not presented to a jury and the facts that increased the sentence from "LIFE" to "FIXED LIFE", were not presented to a jury and proven beyond a reasonable doubt, the

sentence is illegal as it violates the Constitution of the United States.

The Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, (Other than the fact of a prior conviction), must be submitted to a jury and proved beyond a reasonable doubt. The Fifth Amendment's Due Process Clause, and the Sixth Amendment's Notice and jury trial guarantees require that any fact other than a prior conviction that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. Please see, Jones V. United States, 526 U.S. 227, 119 S.Ct.1215, 143 L.Ed.2d 311, (1999).

In the case before this Court, not even the Petitioner knows why he received a sentence of "FIXED LIFE". The Court did not make the additional findings of fact that are required to elevate the sentence from what is statutorily prescribed, ("LIFE"), to the sentence that the Petitioner received, ("FIXED LIFE").

The Petitioner was never given any type of notice that he was in jeopardy of receiving a sentence of "FIXED LIFE". At the time of arraignment the Petitioner was informed that he could receive a sentence of "LIFE". (Which allows for parole eligibility after a certain amount of time).

The State of Idaho has recognized the difference between a sentence of "LIFE" and "FIXED LIFE". Please see, State V. Helms, 143 Idaho 79, 137 P.3d 466, (2006); State V. Eubank, 114 Idaho 635, 759 P.2d 926, (1988).

In those cases the Idaho State Supreme Court, and or the Idaho State Court of Appeals found that in order to sentence a criminal defendant to a term of "FIXED LIFE", the Court must find that a sentence of fixed life is reasonable because,

"..the offense is so egregious that it demands an exceptionally severe measure of retribution and deterrence, or if the offender is so utterly lacking in rehabilitation potential that imprisonment until death is the only feasible means of protecting society.....Unfortunately, in making these determinations a judge only has complete information in regard to deterrence and retribution, which are based upon the nature of the offense. The character of the offender is not completely known because it may evolve over time". Please see, State V. Eubank, Supra,

The Petitioner herein declares that when the Court imposed a sentence of "FIXED LIFE" upon him, it did so in contradiction to the case law from the upper Courts and also violated the United States Constitutional provisions as guaranteed to him under the Sixth Amendment. (The Notice requirement).

A fixed life sentence based primarily upon an evaluation of character is acceptable only if the sentencing Court can determine with a high degree of certainty that the perpetrator can never be safely released into society. Please see, State V. Jackson, 130 Idaho 293, 939 P.2d 1372, (1997).

Because the Court did not make the necessary findings, i.e., that the Petitioner could never be rehabilitated and that he could never be safely released into society; and or, that the crime the Petitioner stands convicted of is more egregious than any other kidnap and Rape, for which a "FIXED LIFE" term was not imposed, then the sentence is illegal and must be corrected.

"A District Court has no power or authority to impose a sentence in the absence of specific statutory authority to do so". State V. Nelson, 966 P.2d 133, (1998); State V. Hatfield, 846 P.2d 1029, (1993); State V. Wilson, 926 P.2d 712, (1996).

This means that a Court can only pronounce upon a criminal Defendant a sentence that is provided for by the Legislature in a specific Statute. That if the sentence that is imposed is not directly found within legislative enactment, then that sentence is illegal.

When the Idaho State Legislature enacted the Unified Sentencing Act, (Which is codified as §19-2513), it made very clear and direct reference to those crimes whereas there was or is a "Mandatory Minimum" term provided for within that particular statute.

§19-2513, (In the Second Paragraph), states as follows:

"If the statute carries a mandatory minimum penalty as provided for by Statute, the Court shall specify a minimum period of confinement consistent with such statute.".....

As previously stated, the Appellant stands convicted of the offenses of Rape, and Kidnaping in the second degree. The Offense of Rape is punishable by a term of imprisonment of One, (1) year to life. (There is no mention of the term "fixed Life").

Clearly the one, (1), year term is a minimum mandatory term as mentioned in the Rape Statute.

Kidnaping in the Second Degree is punishable by a term of imprisonment from Five, (5), years to life. Again, there is no

mention of a "Fixed Life" sentence.

As this Court knows, if there is no Statutory authority to impose a particular sentence, then that sentence is not legal.

Because the crimes for which the Appellant is being sentenced carries within the Statutory scheme for those crimes, a mandatory minimum period of confinement, it is clear that the Court is given it's authority to impose the sentence pursuant to the second paragraph of the unified sentencing act.

The unified Sentencing Act, §19-2513, makes it clear that if there is a mandatory minimum period of confinement provided for in the Statute, then the Court SHALL specify a minimum period of confinement that is consistent with such statute.

When the Court imposed a sentence of "Fixed Life" upon the Appellant, that is not consistent with the mandatory minimum period of confinement as mentioned in the statute for the offense of Rape.

When the Court imposed a 25 year "fixed" term for the offense of Second Degree Kidnaping, that is not consistent with the minimum term as provided for in that statute.

It is not some error that the Legislature did not specifically mention the term "fixed Life" in the above statutes. It is very clear that the Legislature does in fact recognize that a term of "Fixed Life" is more severe than a sentence of life.

In the first degree homicide statute, the legislature made it very clear that a term of "Fixed Life" can be imposed, but to do so there must be certain criteria present. If these are not

or if these aggravating factors are not found, then the sentence shall be "Life".

It is the Idaho State Legislature itself who has used the term "Fixed Life" within the context of the First Degree Homicide Statute. Perhaps more importantly, when the Legislature uses the term "Fixed Life" it also makes it clear that a Jury must find the aggravating factors beyond a reasonable doubt. It also makes clear that a criminal defendant would have notice that his sentence might be a sentence of "fixed Life".

In short, in order to impose a sentence of "fixed Life" for a charge of First Degree Homicide, the Court, (Or a Jury), must find aggravating factors beyond a reasonable doubt.

It stands to no reason that for a lesser charge of Rape that the Court could impose a sentence of "Fixed Life" and never afford to the Defendant the same protections as those provided to a criminal defendant who is being sentenced for a charge of First degree Homicide.

This leads to the inevitable conclusion that a term of "Fixed Life" is not authorized unless a Jury finds certain aggravating factors beyond a reasonable doubt. Furthermore, if the term, "Fixed Life" is not within the specific statutory maximum term provided for by Statute, then such a term can not be legally imposed.

The maximum term provided for, by statute, for the crimes the Appellant stands convicted of is "LIFE". Not "Fixed Life".

The only crime the legislature has authorized a "fixed Life"

sentence for is the crime of first degree homicide, where the term "Fixed Life" is clearly provided for by statute.

Because the crimes for which the Appellant has been sentenced carries within those statutes a mandatory minimum period of confinement, the Court, pursuant to §19-2513, second paragraph, must make the fixed term consistent with the mandatory minimum period of confinement as provided for within the statute in question.

This leaves the Court to impose an "Indeterminate period" of up to life, but not a "Fixed Term" in that amount.

Not all crimes in the State of Idaho carries a mandatory minimum period of confinement within the Statutes, and in those cases the Court has total discretion to "fix" the entire amount of the statutory maximum term.

But, because that is not the situation before this Court, this Court must follow the Statutory commands of the State of Idaho.

"The failure of a State to follow it's own statutory commands, may implicate a Due Process violation under the Fourteenth Amendment to the United States Constitution". Hicks V. Oklahoma, 447 U.S. 343, 65 L.Ed. 2d 175, (1979); Fetterly V. Paskett, 997 F.2d 1295, (1993); Ballard V. Estelle, 937 F.2d 453, (1991); Lambright V. Stewart, 167 F.3d 477, (1999).

The statutory commands at issue in this case are the mandatory terms of §19-2513, second paragraph, whereas it is mandatory that if there is a minimum period of confinement in the statute, that the court must make the minimum term of the sentence to be consistent with that term.

When the sentencing Court imposed a "Fixed Life" term for the offense of Rape, that is not a consistent term to the mandatory minimum term provided for in the Rape statute, and it is not authorized by the laws of the State of Idaho.

The law does authorize a term of "Life", but does not allow this term to be fixed. It is to be an indeterminate term. The "fixed term" is to be consistent with the mandatory minimum provided for in the Statute. That is a One, (1), year term. The Court then is free to impose any amount of indeterminate sentence, up to, and including a term of life, but it does not have the authority to "fix" this term, as it is not provided for by Statute. (The only statute where the term "Fixed Life" is mentioned is the first degree murder statute).

Because the Court has imposed a sentence of "Fixed Life", and there is no type of statutory authority to impose such a term for the offense the Appellant is convicted of, it has sentenced the Appellant to a term that is not authorized by law.

Because the crimes for which the Appellant is being sentenced, carry within those statutes a set mandatory minimum period of confinement, the Court, when imposing the sentence, was mandated to follow the commands of §19-2513, the second paragraph.

Instead, when the Court imposed the sentence upon the Appellant, the Court used the first paragraph of §19-2513,

when it imposed the sentence upon the appellant, and under that paragraph the sentence imposed would have been legal if the crimes for which the Appellant was being sentenced did not have a set mandatory minimum period of confinement named in the statute for which the Appellant was being sentenced.

Finally, because case law from the Idaho State Supreme Court clearly and conclusively depicts that a sentence of "Life" and a sentence of "Fixed Life" are not the same, (A sentence of Fixed Life being more severe), it is clear that in order to have imposed a sentence of "Fixed Life" upon the Appellant, he was entitled to the Due Process Protections of Apprendi V. New Jersey, *Supra*, and the beyond a reasonable doubt finding of In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368, (1970).

Even for the most serious crime of First Degree Murder, the Legislature has made it clear that to impose a sentence of "Fixed Life" there has to be special finds made by the Court, (If a Jury is waived), or by the Jury if the State seeks to impose the sentence of "Fixed Life". It is also a default type of sentence when the death penalty is sought but there are not enough aggravating factors found to impose the death penalty.

In the above case, it is clearly named in the first degree murder statute, §18-4004, that a sentence of "Fixed Life" can be imposed after certain actions are done.

Nowhere in the Statutory scheme of Rape or of second degree kidnaping is there a mention of a "fixed life" term, and therefore it is not authorized, and is an illegal sentence.

CONCLUSION

Because a "FIXED LIFE" term is not authorized by statute, (Only a "LIFE" sentence is so authorized), and because the Idaho Courts have made a clear determination that a sentence of "FIXED LIFE" is more severe than a sentence of "LIFE", it is clear that the holding of the United States Supreme Court in Apprendi V. New Jersey, Supra, has been violated because the jury did not make the required findings, beyond a reasonable doubt, to allow the Court to impose the more severe penalty, therefore making it an unauthorized sentence.

The Court did not state why the Petitioner was receiving a sentence of "FIXED LIFE" for the crime charged. The Court did not make any type of finding which shows that the Petitioner cannot be rehabilitated, or that he can never be release safely into society.

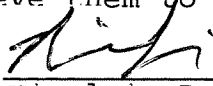
It is for these reasons, and because the sentence imposed is beyond that which is statutorily depicted for, that this Court should enter an order which allows for a new sentencing hearing, at which the Petitioner should be appointed Counsel to assist him.

OATH OF PETITIONER

Comes now, Frank Nicolai, the Petitioner herein, who avers and states as follows:

I have read the enclosed Brief. I know the contents therein and believe them to be true and correct to the best of my belief.

Frank


Nicolai, Pro-Se

4-8-14
Dated

EXHIBIT A

TABLE 1	
Length Of Sentence	Minimum Time To Be Served Before Initial Hearing
Three (3) years or less	- Nine (9) months
More than three (3) years to less than five (5) years	- Twelve (12) months
Five (5) years to less than seven (7) years	- Fifteen (15) months
Seven (7) years to less than ten (10) years	- Twenty (20) months
Ten (10) years to less than sixteen (16) years	- Twenty-four (24) months
Sixteen (16) years to less than twenty-six (26) years	- Thirty-six (36) months
Twenty-six (26) years up to life sentence	- Forty-eight (48) months
Life sentence	- Sixty (60) months

(3-23-98)

ii. In cases of offenses committed on or after February 1, 1987, and a minimum fixed term has been specified, the initial hearing may be scheduled prior to the parole eligibility date, during the month of parole eligibility, or as noted in Subsection 250.02.b.vi. (3-30-01)

iii. Consecutive Sentences. All fixed terms will be served before the indeterminate terms commence. (3-23-98)

iv. When more than one (1) sentence is being served concurrently, the initial hearing will not be scheduled until all fixed terms have been served. (3-23-98)

v. If an inmate escapes prior to the primary review or the initial hearing, the review or hearing will be conducted within a reasonable time of notification of the inmate's return, taking into consideration any additional commitments. (3-23-98)

vi. If an inmate is committed to the department of correction and such inmate is eligible for parole immediately or within a short period of time, the initial parole hearing will be scheduled six (6) months from the month the commission was notified of the commitment. (4-5-00)

c. The commission is not responsible for the accuracy of the sentence calculation as determined by the department of correction, records office. The commission utilizes the documents as being accurate. (3-30-01)

03. General Conditions of Parole. The commission establishes rules and conditions for every inmate released to parole, and those conditions are. (3-23-98)

a. Parolee will go directly to the destination approved by the commission and, upon arrival, report as instructed to the parole officer or person whose name and address appear on the arrival notice; any deviation in travel plans will require prior permission from the commission staff. (3-23-98)

b. The parolee shall. (3-23-98)

i. Work diligently in a lawful occupation or a program approved by the commission or supervising officer and not change employment or designated program without written permission from the commission or supervising officer. (3-23-98)

ii. Support dependents to the best of his ability. (3-23-98)